Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:F:BOS:POSTF-134157-02
BJLaterman

date: 8/27/02

to: [redacted], Team Manager, LMSB
att: [redacted], Team Coordinator

from: Associate Area Counsel, Boston
CC:LM:FS:BOS

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in re: [redacted]
NOL Carryforwards
Taxable Years Ended December 31, [redacted], March 31, [redacted] and March 31, [redacted]

This is in response to your request of June 24, 2000 regarding the audit of NOL carryforwards from the taxable years ended December 31, [redacted] through December 31, [redacted] and March 31, [redacted] to the taxable year ended March 31, [redacted]. This memorandum should not be cited as precedent.

The returns filed by the above-mentioned consolidated group for the taxable years ended December 31, [redacted], March 31, [redacted] and March 31, [redacted] are presently being audited. The consolidated group had NOL carryforwards from the taxable years ended December 31, [redacted] through December 31, [redacted] and March 31, [redacted] which were fully utilized on the group's return for the taxable year ended March 31, [redacted]. The statute of limitations on assessment for the taxable years ended December 31, [redacted], December 31, [redacted], and December 31, [redacted], has expired. An International Examiner examined and issued an RAR for the [redacted] and [redacted] taxable years. In addition, the Examiner also issued a no change report for the [redacted] taxable year.

A member of the above-mentioned consolidated group was an [redacted]% partner in a TEFRA partnership. The TEFRA partnership returns for [redacted], [redacted] and [redacted] have potential issues which impact the amount of the NOL carryforwards. It has been indicated that the statute for these TEFRA partnership returns has expired. The audit team wishes to examine the NOL carryforward years up to the amount of the NOL carryforward losses. The audit team seeks advice as to how to deal with the TEFRA partnership items; i.e., as to whether the partnership issues can now be audited as part of the examination of the NOL carryforwards.

I.R.C. §6214(b)provides that:

> The Tax Court in redetermining a deficiency of income tax for any taxable year or of gift tax for any calender year or calender quarter shall consider such facts with relation to the taxes for other years or calender quarters as may be necessary correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the tax for any other year or calender quarter has been overpaid or underpaid.

Therefore, as part of the examination it is appropriate to examine the years(including years on which the statute has run)which gave rise to the NOL carryforwards in order to determine the correct tax for the audit years; i.e., you are looking at the NOL years only so far as they impact the audit years.

With regard to the TEFRA partnership, the TEFRA rules, codified at I.R.C. §§6221 through 6223, segregate adjustments attributable to an interest in a partnership, which is subject to the TEFRA statutes, from all other adjustments which can be made to the partner's return. So-called TEFRA adjustments to the partner's return generally can be made only after all partnership proceedings are completed. Since no adjustments were made at the partnership level(to the issues that you wish to examine),we are bound by the reporting position of the partnership with regard to these issues. See Doe v. Commissioner, 97-1 USTC par. 50460(10th Cir. 1997),affg. in part and revg. in part T.C. Memo. 1993-543; Roberts v. Commissioner, 94 T.C. 853(1990); Estate of Quick, 110 T.C. 172(1998). Chief Counsel has taken the position that this approach applies in the all situations where TEFRA partnerships are involved; i.e., in the course of determining what the proper NOL carryforwards should be, the Service is bound by the reporting position of the partnership(as reflected on the partnership return)unless the TEFRA proceedings have been utilized to make appropriate adjustments to the partnership's reporting positions.[1] However, all non-TEFRA issues which are relevant can be examined for the purpose of determining the proper amount of the NOL carryforwards.

P.L. 97-248, 3402(a)amended the Tax Equity and Fiscal Responsibility Act of 1982 to provide that(in the case of a partnership tax year ending after August 5, 1997) the TEFRA audit procedures do not apply(unless the partnership elects to have them apply), to a partnership consisting of 10 or fewer partners

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[1]We note that we have been advised of this position by William Heard(CC:PA:AP:JP 202-622-7940).

each of whom is:
(1)a natural person other than a nonresident alien;(2)a C corporation; or(3)an estate of deceased partners. I.R.C. §6231(a)(1)(B)(i).If the partnership in issue was not a TEFRA partnership for its taxable years ending after August 5, 1997, then the normal rule of I.R.C. §6214(b)would apply and, consequently, you could examine the partnership issues in the course of determining the proper NOL carryforwards.

With regard to the impact of the prior RARs for [redacted] and [redacted] and the no charge report for [redacted], there is no legal prohibition(except as indicated above)against applying the rule of I.R.C. §6214(b); i.e., examining the closed audited years for the purpose of determining the proper NOL carryforwards into the open examination years. As a matter of policy, however, you should ascertain that you are following all internal Exam guidelines regarding this matter.

If we can be of any further assistance, the undersigned can be reached at 617-565-7855.

BARRY J. LATERMAN
Special Litigation Assistant